

NO. 47800-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT’S OPENING BRIEF

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A. INTRODUCTION

The trial court failed to make an inquiry into whether there was a sufficient factual basis to find Justin Davis was guilty of drive-by shooting. The failure to make an adequate inquiry requires this Court to vacate Mr. Davis' plea.

Resentencing is also required to correct the multiple errors committed by the court. Included in Justin Davis' criminal history is an out-of-state conviction for simple burglary which is not comparable to any offense which could be scored against Mr. Davis.

Additionally, the court imposed unconstitutionally vague conditions on his community supervision which require resentencing when the court ceded its authority to impose conditions to the community corrections officer.

Finally, the court imposed legal financial obligations without making an inquiry regarding Mr. Davis' ability to pay.

This court should order a new sentencing hearing where these errors can be corrected.

B. ASSIGNMENTS OF ERROR

1. The court lacked a sufficient basis to find Mr. Davis guilty of drive-by shooting.

2. A Louisiana “simple burglary” was included in Mr. Davis criminal history, which is not comparable to an offense which may be included in Mr. Davis’ criminal history.

3. The court ordered constitutionally vague conditions of community supervision.

4. The court ordered conditions of community supervision which were not crime related.

5. The court ordered legal financial obligations without making an inquiry into Mr. Davis’ ability to pay.

6. Additional legal financial obligations should not be imposed should Mr. Davis not substantially prevail on this appeal.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. For the court to be satisfied a plea of guilty is knowing, intelligent, voluntary, the court must make a sufficient inquiry into whether there is a factual basis for the plea. Where the court fails to make a sufficient inquiry, should the plea be vacated?

2. For a foreign offense to be included in criminal history, it must be comparable to a Washington offense. The crime of simple burglary in Louisiana is not comparable to any offense in Washington which may be included in Mr. Davis' offender score. Does the inclusion of an out-of-state criminal offense which may not be scored require remand for resentencing?

3. Conditions of community supervision which do not provide ordinary people fair warning of the proscribed conduct and have standards that are not definite enough to protect against arbitrary enforcement are unconstitutionally vague. Are conditions which defer to the community correction officer to determine whether a person should either remain within or without geographic boundaries, participate in unspecified crime related treatment and counseling services, and comply with unspecified crime related prohibitions unconstitutionally vague?

4. At sentencing, a court may order crime related prohibitions. Conditions of community supervision must be directly related to the circumstances of the crime. Where the court imposed conditions upon Mr. Davis which were not directly related to the circumstances of the crime, is remand required to correct the sentencing error?

5. Legal financial obligations may only be imposed where the court finds a convicted person has the current or future ability to pay. Where the court failed to make an individualized inquiry into Mr. Davis' ability to pay, is remand required to determine whether he has the present or future ability to pay legal financial obligations?

D. STATEMENT OF THE CASE

Justin Davis was originally charged with drive-by shooting, three counts of assault in the first degree, and unlawful possession of a firearm. CP 3. The State alleged Mr. Davis fired at a vehicle which had been stolen from him. CP 4. A firearm was recovered from the vehicle where Mr. Davis had been a passenger when he was arrested by the police. CP 5.

Mr. Davis elected to proceed to trial pro se. 3/25/15 RP 12. Mr. Davis was advised by the court his decision to proceed pro se "could be irrevocable." 3/25/15 RP 13. The court found the waiver to be valid and granted Mr. Davis' request to proceed pro se. 3/25/15 RP 19.

An amended information was filed on May 22, 2015, alleging a new charge of tampering with a witness. CP 53. Mr. Davis began trial on June 9, 2015. 6/18/15 RP 63. A jury was selected and the State presented much of its case against Mr. Davis.

On June 17, 2016, and while still in trial, Mr. Davis negotiated a plea bargain with the State. 6/17/15 RP 31. Mr. Davis pled guilty to drive by shooting and unlawful possession of a firearm. 6/17/15 RP 31, CP 75. All other charges were dismissed as part of the plea bargain.

Mr. Davis subsequently moved to withdraw his plea. 6/17/15 RP 36. The court found Mr. Davis had entered his plea knowingly, voluntarily and intelligently. 6/17/15 RP 39. The court denied Mr. Davis' motion to withdraw his guilty plea. 6/17/15 RP 39.

The court sentenced Mr. Davis to 70 concurrent months of incarceration on both charges and to eighteen months of community custody, on the drive by shooting charge. 6/17/15 RP 42, CP 79-80. At sentencing, the court found:

There was purposeful conduct here and there was the discharge of a firearm here from a moving vehicle. And while I understand that there's some evidence that the defendant was firing a weapon into the ground, there's also other evidence that he was chasing down another car, another car that contained individuals who it was alleged had robbed Mr. Davis.

6/17/15 RP 41.

Although no inquiry was made on the record, the court found Mr. Davis had an offender score of seven. CP 76. Included in Mr. Davis' criminal history was a conviction from Louisiana for the crime

of “simple burglary”. CP 76. This crime is not designated as a felony or misdemeanor in the criminal history. CP 76,

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	THEFT 3		PUYALLUP MUNICIPAL COURT	08-03-2014	A	MISD
2	SIMPLE BURGLARY	07-10-2007	EAST EATON ROUGE PARISH SO.	08-08-2006	A	
3	UPCS W/INT TO DELIVER	09-20-2011	SUPERIOR CT - PIERCE CTY	03-13-2011	A	NV
4	UPCS - MDMA	09-20-2011	SUPERIOR CT - PIERCE CTY	03-13-2011	A	NV
5	UPOF 2	09-20-2011	SUPERIOR CT - PIERCE CTY	03-13-2011	A	NV
6	ASSAULT 3	09-20-2011	SUPERIOR CT - PIERCE CTY	03-13-2011	A	NV
7	UPCS	05-14-2013	SUPERIOR CT - PIERCE CTY	07-18-2011	A	NV

[] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[X] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

CP 76.

The court ordered Mr. Davis to pay \$ 800 in legal financial obligations. 6/17/15 RP 42, CP 78. These included the victim penalty assessment, the DNA collections fee and court costs. CP 77. Although no inquiry was conducted into Mr. Davis’ ability to pay before imposing these costs, evidence exists to suggest Mr. Davis lacks the ability to pay. Mr. Davis was unable to post a bail, despite the court reducing it. 5/12/15 RP 4. He also did not have any clothing to wear during trial and had to borrow clothing from his standby counsel. 6/8/15 RP 4.

The court also ordered Mr. Davis to comply with conditions of community supervision. 6/17/ RP 42-43, CP 80. The conditions of confinement included provisions that Mr. Davis remain either within or outside a specified geographic area, which was not defined, participate in crime related treatment or counseling services, which were also not specified, and comply with crime related prohibitions which the court also did not explain. CP 80.

The court orders that during the period of supervision the defendant shall:

- ☒ consume no alcohol.
- ☐ have no contact with: _____
- ☒ remain ☐ within ☐ outside of a specified geographical boundary, to wit: per CEO
- ☐ not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age
- ☒ participate in the following crime-related treatment or counseling services: per CEO
- ☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse
☐ mental health ☐ anger management and fully comply with all recommended treatment.
- ☒ comply with the following crime-related prohibitions: per CEO
- ☐ Other conditions: _____

CP 80.

E. ARGUMENT

1. THE COURT LACKED A SUFFICIENT BASIS TO ACCEPT MR. DAVIS' PLEA.

Due process requires that a guilty plea be made intelligently, voluntarily and with knowledge that certain rights will be waived.

Matter of Montoya, 109 Wn.2d 270, 277, 744 P.2d 340 (1983). “[A]n

accused must not only be informed of the requisite elements of the crime charged, but also must understand that his conduct satisfies those elements.” *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 87–88, 660 P.2d 263 (1983). A constitutionally invalid guilty plea gives rise to actual prejudice. *Montoya*, 109 Wn.2d at 277. Because the guilty plea statement and colloquy Mr. Davis had with the court failed to make out a sufficient basis to find Mr. Davis committed a drive-by shooting, his plea to that charge should be vacated.

a. A court shall not enter a guilty plea unless there is a factual basis for the plea.

A court shall not enter a judgment upon a plea of guilty unless the court is satisfied there is a factual basis for the plea. CrR 4.2(d). A judge may accept a plea guilty plea only if it is made voluntarily, competently, with an understanding of the nature of the charge and the consequences of the plea, and when the judge is satisfied that there is a factual basis for the plea. *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010).

The trial judge must find there is sufficient for a jury to determine the defendant is guilty of the crime charged. *State v. Easterlin*, 159 Wn.2d 203, 149 P.3d 366 (2006). Requiring this examination protects a defendant ““who is in the position of pleading

voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” *Matter of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (citing *McCarthy v. United States*, 394 U.S. 459, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (quoting *Fed.R.Crim.P. 11*, Notes of Advisory Committee on Criminal Rules)). The material the trial court relies upon to make its decision must be part of the record. *Irizarry v. United States*, 508 F.2d 960, 967, (2d Cir. 1974); *United States v. Davis*, 493 F.2d 502, 503 (5th Cir. 1974).

b. Mr. Davis’ allocution did not not provide a factual basis for his guilty plea.

Mr. Davis made the following statement in his guilty plea statement, which the court also read to him.

On November 17th, 2014, I fired a gun from a moving vehicle creating a substantial risk of death or serious physical injury to individuals in and around the immediate area of the motor vehicle. I was a passenger at the time. I also have a previous conviction for a serious offense and am prohibited from owning or possessing a firearm.

CP 67. 6/17/15 RP 29.

When the court asked Mr. Davis if this is in fact what happened, Mr. Davis replied that it was “similar.” 6/17/15 RP 30. The court then had the following colloquy with Mr. Davis.

Q Say again?

A It was similar.

Q Sir, let me ask you this, did you fire a gun from a moving vehicle?

A Yes, sir.

Q Had you had a previous conviction for what is defined as a serious offense under the statute?

A Yes, sir.

THE COURT: All right. I'm going to find that Mr. Davis's comments as well as what is written down here satisfy the providency inquiry. Is the State satisfied that that satisfies the providency inquiry necessary for the these tow offenses?

MR. CURTIS: Yes, sir, your Honor.

6/17/15 RP 30.

There was no agreement in Mr. Davis' guilty plea statement the judge could consider police reports or the probable cause statement to determine whether a factual basis existed for the plea. CP 67, 6/17/15 RP 29. The court did not declare it was considering any other evidence in making its determination there was a factual basis for Mr. Davis' plea. 6/17/15 RP 30.

c. *The court was required to make further inquiry to determine whether there was only a factual basis for the lesser charge of reckless endangerment.*

Reckless endangerment is a lesser included charge of drive-by shooting. A charge is a lesser included offense of a more serious charge where (1) each of the elements is a necessary element of the offense charged and (2) the evidence in the case supports an inference the defendant committed the lesser crime. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (citing *State v. Workman*, 90 Wash.2d 443, 447–48, 584 P.2d 382 (1978)).

To prove drive-by shooting, the State must establish all of the elements required to prove reckless endangerment. *See* RCW 9A.36.050(1)¹. Drive-by shooting contains additional elements and reckless endangerment is specifically defined as conduct which does not amount to a drive-by shooting. *See* RCW 9A.30.045(1)². Because Mr. Davis plea to drive-by shooting does not meet constitutional

¹ A person is guilty of reckless endangerment when he recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1).

² A person is guilty of drive-by shooting when he recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle. RCW 9A.30.045(1).

muster, his conviction for drive-by shooting must be vacated. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006).

Mr. Davis' guilty plea and the colloquy which followed did not make out the charge of drive-by shooting. *See* RCW 9A.30.045(1).

When the court inquired of Mr. Davis about what he did and he replied it was "similar" to the statement, the court should have made further inquiry to determine whether the statement only supported a charge of reckless endangerment. *See* RCW 9A.36.050(1). While the court inquired about whether Mr. Davis fired a weapon, the court did not ask Mr. Davis whether his conduct created substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1). The record the trial court relied upon to determine whether there was a factual basis for Mr. Davis' guilty plea is therefore deficient. The failure of court to determine there was a sufficient factual basis for Mr. Davis' plea requires vacation. *Keene*, 95 Wn.2d at 213.

2. MR. DAVIS' CRIMINAL HISTORY INCLUDES A LOUISIANA CONVICTION WHICH IS NOT COMPARABLE TO ANY OFFENSE WHICH MAY BE INCLUDED IN HIS OFFENDER SCORE.

The Sentencing Reform Act creates a grid of standard sentencing ranges based upon the "offender score" and the seriousness level of the offense of conviction. RCW 9.94A.510. The offender score

is calculated by totaling prior felony convictions, certain juvenile offenses and qualifying misdemeanors. RCW 9.94A.533.

a. Out-of-state convictions which are not comparable to an equivalent Washington crime may not be counted as criminal history.

Out-of-state convictions may be included in the offender score if they are comparable to equivalent Washington offenses. RCW 9.94A.525 (3). To score, there must be substantial similarity between the elements of the foreign offense and the Washington offense. *In Re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

Courts apply a two-part test to determine comparability. *State v. Morley*, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). The court first compares the elements of the out-of-state crime with the relevant Washington crime. If the elements of the out-of-state crime are comparable to those of a Washington offense, then the out-of-state conviction is counted as an equivalent Washington conviction. *State v. Jordan*, 180 Wn.2d 456, 461, 325 P.3d 181 (2014). Then, if the elements of the out-of-state crime are different or broader, the sentencing court determines whether the defendant's conduct would have violated the comparable Washington statute. *State v. Olsen*, 180 Wn.2d 468, 473, 325 P.3d 187 (2014).

Questions regarding the comparability of offenses present issues of law reviewed de novo. *See State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007). This is true even if the sentence imposed would fall within the standard range found by the court and the recalculated range, as the reviewing court cannot say that the trial court would necessarily impose the same sentence had the range been different. *State v. Jackson*, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005).

Mr. Davis stipulated to his criminal history, but he did not affirmatively acknowledge the out-of-state conviction for burglary was comparable to a Washington State felony. *See* CP 71. No barrier to raising this prior conviction on appeal exists. *Jackson*, 129 Wn. App. at 95.

b. Louisiana's "simple burglary" is not equivalent to an offense which may be scored under the Sentencing Reform Act.

Mr. Davis' prior criminal history includes a conviction for "simple burglary," which the state alleges occurred in Louisiana. CP 71. Simple burglary in Louisiana is defined as follows:

Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60.

La. Stat. Ann. § 14:62.

There is no equivalent offense which may be scored against Mr. Davis' convictions. In Washington, a person is guilty of burglary if he enters or remains unlawfully in a building or dwelling with intent to commit a crime against a person or property therein. RCW 9A.52.025; RCW 9A.52.030.

- i. The intent elements of Washington and Louisiana's burglary statutes are not comparable.

While Washington does not need to prove the specific crime the defendant intended to commit, the State must prove an intent to commit a crime against "person or property." *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). When Washington re-codified its criminal code in 1976, the final legislative report acknowledged the existence of different types of crimes: crimes against persons, crimes against property, victimless crimes and miscellaneous crimes. *State v. Larkins*, 147 Wn. App. 858, 863–64, 199 P.3d 441 (2008) (citing 1976 Final Legislative Report, 44th Wash. Leg., at 243–44). Because of this, courts have found crimes exist that do not fit within the definitions for committing a burglary in Washington. *Id.*

To prove simple burglary in Louisiana, the State must establish intent to commit a felony or any theft. La. Stat. Ann. § 14:62; *see also State v. Naquin*, 61 So. 3d 67, 71 (La. Ct. App. 2011). The Louisiana statute is broader because it includes unauthorized entry with the intent to commit crimes which could not be predicates for burglary in Washington. In fact, many felonies committed in Washington would not fall within Louisiana's broad definition. *See, e.g., State v. Devitt*, 152 Wn. App. 907, 913, 218 P.3d 647 (2009). Because intent to commit a simple burglary in Louisiana is not comparable to an offense which may be scored against Mr. Davis in Washington, this offense should not have been included in Mr. Davis' criminal history.

- ii. Louisiana's burglary statutes includes unauthorized entry into a vehicle, watercraft or cemetery, which are not included in Washington's statute.

Washington's burglary statute requires the state to prove the crime occurred within a building. RCW 9A.52.030(1). Unlike Louisiana's statute, this definition does not include vehicles. *State v. Tyson*, 33 Wn. App. 859, 862, 658 P.2d 55, 56 (1983). Likewise, watercraft and cemeteries, which are part of the definition of simple burglary in Louisiana, are not included in Washington's definition of the felony.

The description of Mr. Davis' criminal history also shows no indication the crime Mr. Davis was convicted of in Louisiana was committed in a way where it could be included in Mr. Davis offender score. CP 76. This error in Mr. Davis' criminal history requires correction.

c. Remand for resentencing is necessary to correct the sentencing error.

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented. RCW 9.94A.530(2). Because Mr. Davis' criminal history is not supported by facts and information, this Court should order remand for a new sentencing hearing. *State v. Ramirez*, 190 Wn. App. 731, 735, 359 P.3d 929 (2015).

3. THE COURT IMPOSED COMMUNITY CUSTODY CONDITIONS WHICH ARE UNCONSTITUTIONALLY VAGUE.

a. To be constitutional, a law must provide ordinary people fair warning of the proscribed conduct and have standards which protect against arbitrary enforcement.

Due process requires laws not to be vague. U.S. Const. amend 14; Const. art. I, § 3. Laws must provide ordinary people fair warning

of the proscribed conduct and have standards that are definite enough to protect against arbitrary enforcement. *State v. Irwin*, 191 Wn. App. 644, 653, 364 P.3d 830 (2015). A community custody violation is unconstitutionally vague if it fails to do either. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Courts have frequently held that community custody conditions that require further definition from community custody officers are unconstitutionally vague. *Bahl*, 164 Wn.2d at 753; *State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010); *State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). When finding these conditions to be unconstitutionally vague, the court has held that if an ordinary person cannot understand what conduct is proscribed, the statute is unconstitutionally vague. *Bahl*, 164 Wn.2d at 753. Further, a statute which is unconstitutionally vague is manifestly unreasonable and therefore an abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

- b. *Allowing the community custody officer to determine Mr. Davis' community custody conditions renders the conditions unconstitutionally vague.*

The court ordered Mr. Davis to either “remain [] within [] outside a specified geographic boundary, to wit: per CCO.” CP 80. The

court also ordered Mr. Davis to participate in “crime related treatment or counseling services: per CCO.” CP 80. Finally, the court ordered Mr. Davis to “comply with the following crime-related prohibitions: per CCO.” CP 80.

These conditions are unconstitutionally vague. These conditions surrendered the requirement of a definition from the court to the community corrections officer. An ordinary person cannot understand what conduct is proscribed nor protect themselves against arbitrary enforcement. Specifically, the prohibition against remaining at a specified geographical boundary not only fails to specify the location Mr. Davis should be aware of, but also does not notify him as to whether he should remain within or outside those boundaries. CP 80. The requirement Mr. Davis participate in treatment or counseling also fails to identify what programs he should engage in, instead ceding authority to decide what these programs should be to the community corrections officer. CP 80. Finally, the court ordered Mr. Davis to comply with crime related prohibitions to be determined by the community corrections officer, without specifying what these should be.

These conditions are vague and unconstitutional. They should be stricken and a new sentencing hearing should be ordered. *Valencia*, 169 Wn.2d at 795.

4. LEGAL FINANCIAL OBLIGATIONS WERE IMPOSED AGAINST MR. DAVIS WITHOUT CONDUCTING AN INQUIRY INTO HIS ABILITY TO PAY.

Imposing legal financial obligations against indigent defendants imposes significant burdens on offenders and our community, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83 (2016) (quoting *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). Where legal financial obligations are imposed without an individualized inquiry into the defendant’s ability to pay, the reviewing court should remand for a new sentencing hearing. *Id.*, *see also* *Blazina*, 182 Wn.2d at 830; *State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016); *State v. Leonard*, 184 Wn.2d 505, 358 P.3d 1167 (2015) (*per curiam*); *State v. Cole*, 183 Wn.2d 1013, 353 P.3d 634 (2015).

In addition to mandatory legal financial obligations, the court imposed two hundred dollars in court costs. CP 77. There is no evidence which would suggest Mr. Davis has a current or future ability

to pay this discretionary fee. Mr. Davis was held on bail during the course of his trial and had to borrow clothing from his standby attorney to avoid wearing his jail uniform. He was represented by appointed counsel before he elected to proceed pro se and is currently represented by appointed counsel on his appeal.

Because the court did not make an individualized inquiry into Mr. Davis ability to pay before imposing court costs, this Court should remand the matter for resentencing.

5. COSTS OF APPEAL SHOULD NOT BE IMPOSED AGAINST MR. DAVIS IF HE IS NOT THE PREVAILING PARTY.

Courts of Appeal have the discretion to not impose the costs of appeal upon a person unable to pay. *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3 612 (2016). A court considers the continuing indigency of an appellant along with other factors to determine whether costs should be imposed. *Id.*, at 390-91.

While the court made no inquiry into Mr. Davis' ability to pay before imposing legal financial obligations, the court did find Mr. Davis indigent with respect to his right to counsel on appeal. 6/17/15 RP 43.

Evidence of Mr. Davis' indigency is clear. Mr. Davis was unable to post a bail, despite the court reducing it. 5/12/15 RP 4. He did not have any clothing to wear during trial except for his jail uniform and had to borrow clothing from his standby counsel. 6/8/15 RP 4. In addition, despite Mr. Davis' displeasure with his appointed counsel and his frustration with not having an attorney, Mr. Davis remained without counsel during the course of his trial, guilty plea, and sentence.

Mr. Davis inability to pay court costs is also apparent from his declaration seeking appointment for an attorney on appeal. Mr. Davis stated he owned nothing of value and had no savings. He declared he already owed legal financial obligations, but was unaware of how much. His only source of income appears to be \$190 in food stamps.

Mr. Davis is unlikely to be able to pay the cost of appeal if he does not substantially prevail in this appeal. Under GR 34, courts must find a person indigent if they received need based assistance or food stamps. *City of Richland v. Wakefield*, ___ P.3d ___, 92594-1, 2016 WL 5344247, at *4 (Wash. Sept. 22, 2016) (citing *State v. Blazina*, 182 Wn2d 827, 838, 344 P.3d 680 (2015)). “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that

person's ability to pay LFOs.'" *Wakefield*, at *4 (citing *Blazina* 182 Wn.2d at 839).

F. CONCLUSION

Mr. Davis was entitled to withdraw his plea because it lacked a sufficient basis to distinguish between drive by shooting and reckless endangerment.

In addition, the sentencing errors committed by the court require remand for a new sentencing hearing. Mr. Davis is entitled to a corrected account of his criminal history. The conditions of community supervision which are unconstitutionally vague must be stricken, as are those which are not crime related.

Finally, Mr. Davis is entitled to an individualized inquiry into his ability to pay legal financial obligations before they may be imposed.

Should Mr. Davis not prevail upon his appeal, this Court should not impose additional court costs.

DATED this 20th day of September 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)

Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 47800-5-II
v.)	
)	
JUSTIN DAVIS,)	
)	
Appellant.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF OCTOBER, 2016.



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